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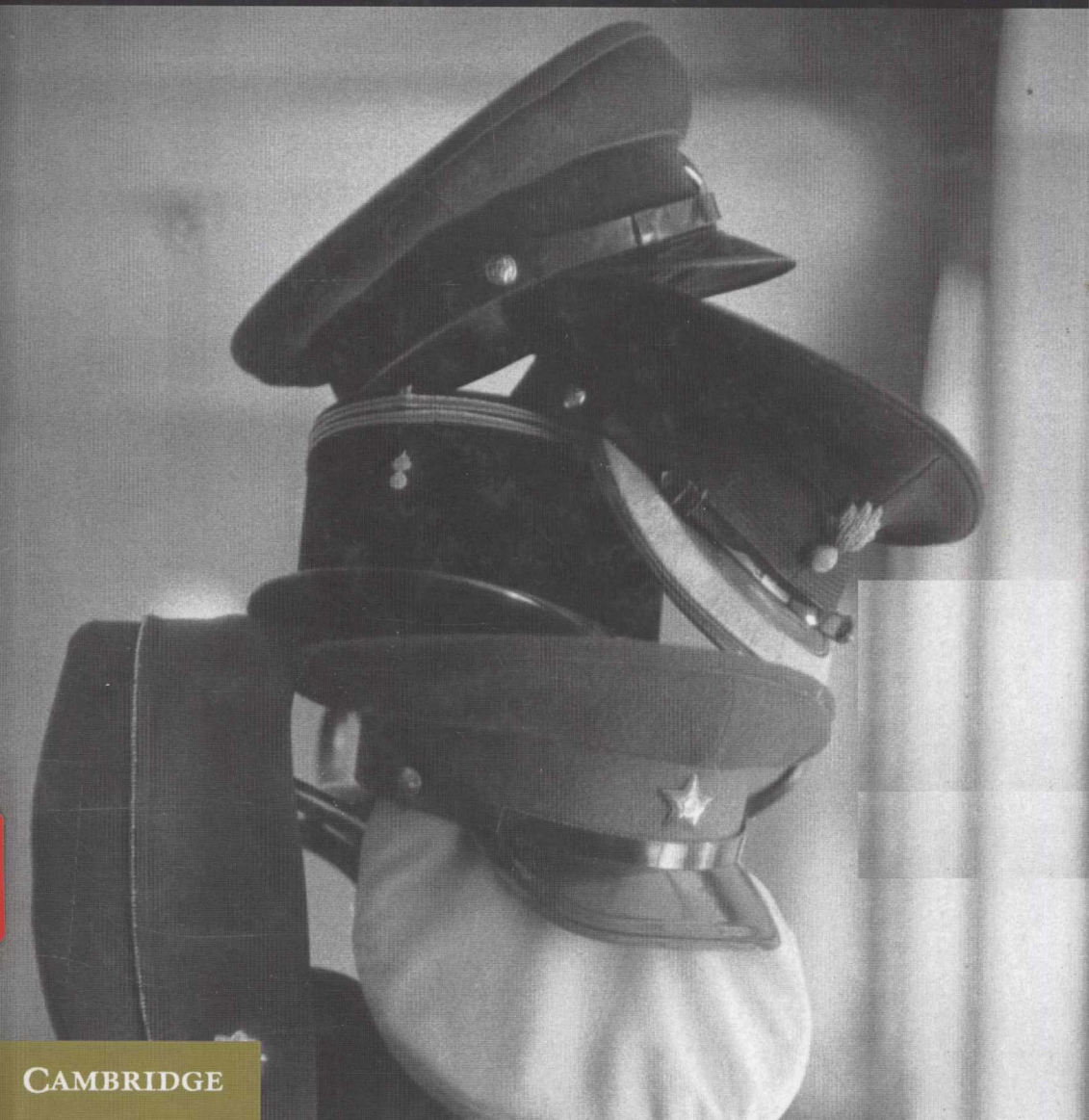
'Crimes against Peace' and International Law

KIRSTEN SELLARS



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Preface

In an article written in 1951, Josef Kunz reflected upon Roscoe Pound's view that primitive law aims, before anything else, to establish peace and guarantee the *status quo*.[1] Kunz was writing at a time when the world had been through two cataclysmic world wars and now faced the threat of a third, and he observed that of the two juridical values, security and justice, security was 'the lower, but most basic value'.[2] His observation was certainly true of the early experiments in international criminal law carried out at the International Military Tribunals at Nuremberg and Tokyo. Here, security was the overriding concern, represented by the central charge of 'crimes against peace'. For the prosecuting Allied powers in 1945, peace – even an unjust peace – was infinitely preferable to war, whether 'just' or not.

This study traces the emergence of the idea of criminalising aggression, from its origin after the First World War to its high-water mark at the post-war tribunals and its subsequent abandonment during the Cold War. The concept first emerged in 1918, when Britain and France, the two leading entente powers, considered the possibility of prosecuting the former Kaiser for initiating the First World War. The ensuing debate raised fundamental questions, such as whether national leaders could be held personally responsible for embarking upon war – and if so, whether their punishment should take a legal or a political form. In the event, under pressure from the United States, it was decided not to charge Wilhelm II for the crime of aggression. Instead, energies

[1] J.L. Kunz, 'Bellum justum and bellum legale', *American Journal of International Law* 45 (1951), p. 533.

[2] Ibid., pp. 533–534.

were directed towards the newly founded League of Nations, which had a primarily preventative purpose: to discourage states from going to war in the future, rather than seeking to punish individuals after the event.

After the Second World War (and the failure of the League of Nations to prevent it) the same issues arose once more. The victorious Allies, this time led by the United States and the Soviet Union, returned to the idea of criminalising aggression. They decided to prosecute the German leaders for crimes against peace, as part of a broader plan to dispose of their former enemies, impose control over Germany, and retrospectively legitimise their own wartime aims and conduct. The trial, wrote Telford Taylor, would enable the Allies, 'To give meaning to the war against Germany. To validate the casualties we have suffered and the destruction and casualties we have caused. To show why those things had to be done.'[3]

At the 1945 London Conference, the prosecuting powers conceived the charge of crimes against peace – the planning, preparation, initiation and waging of wars of aggression – as an *ad hoc* measure, to be applied only to the leaders of the European Axis powers. The charge, duly enshrined in the Nuremberg Charter, could best be described as innovation in the service of orthodoxy: the innovation being the prosecution of leading individuals for embarking upon war, and the orthodoxy being the maintenance of the international *status quo*. The Allies were cautious innovators, however, and they recognised that the new aggression charge involved risks as well as benefits. They were sensitive to accusations that they themselves had been guilty of similar crimes before and during the Second World War, and mindful too that they were creating a legal precedent that might one day be used against them. So, Articles 1 and 6 of the Charter stated that the court would try only the 'major war criminals of the European Axis',[4] while Article 3 precluded challenges to the Tribunal's authority,[5] and Article 18 enjoined it to 'rule out irrelevant issues'[6] – in other words, counter-charges against the Allies.

[3] Taylor, 'An approach to the preparation of the prosecution of Axis criminality', 2 June 1945, 1: Box 7, RG238, US Counsel for the Prosecution, Washington, correspondence 1945–46, NARA.

[4] London Conference, *Report of Robert H. Jackson, United States representative, to the international conference on military trials* (Washington DC: Department of State, 1949), pp. 422, 423.

[5] Ibid., p. 422. [6] Ibid., p. 426.

When the judges at Nuremberg eventually handed down their decision against the leaders of Germany in October 1946, they declared crimes against peace to be 'the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole'.[7] These words were intended to validate the Allies' prosecutorial approach, but the significant number of acquittals reflected the judges' unease about convicting on this and the associated conspiracy count. Legal opinion outside the court was also far from unanimous. Some endorsed the Judgment, believing the Second World War to be an exceptional event requiring special legal remedies, and commending the Tribunal for advancing international law. Others, however, saw the charge of crimes against peace as an *ex post facto* enactment, selectively applied by the prosecuting powers to serve their own interests.

Stung by these criticisms, the Allies did everything they could to ensure that the Nuremberg Judgment on crimes against peace would be reinforced by their other great assize: the International Military Tribunal for the Far East, set up in Tokyo in 1946 to try the Japanese leaders. In this, they were ultimately unsuccessful. The problems of legitimacy associated with the charge at Nuremberg were simply replicated in less auspicious circumstances at Tokyo. Although Tokyo's Majority Judgment duplicated the legal principles set out in the Nuremberg Judgment, the trial left a highly ambivalent legacy on the question of aggression, shaped by the dissenting judgments as well as by the exigencies of the Cold War. By the time the Tribunal closed in late 1948, the prosecuting powers were keen to put trials of former wartime enemy leaders – and the attendant crimes against peace charge – well behind them.

Meanwhile, attempts in the United Nations to place crimes against peace on a stronger jurisdictional footing fared little better. In 1946, the General Assembly had affirmed the 'Nürnberg Principles', including the crimes against peace charge, but attempts to codify these principles in the 'draft Code of Offences Against the Peace and Security of Mankind' stalled in the early 1950s, and would not be considered again for another third of a century. The idea of prosecuting leaders for aggressive war – which, after all, had been devised by the Allies as a temporary expedient – had exhausted its usefulness. Altogether, the

[7] International Military Tribunal, *Trial of the major war criminals before the International Military Tribunal*, 'The Blue Series', 42 vols. (Nuremberg: IMT, 1947–49), vol. 1, p. 186.

charge of crimes against peace had an operative existence of just three years, from the opening of the Nuremberg trial in November 1945 to the closing of the Tokyo trial in November 1948 – a modest legacy that stands in marked contrast to the grand pronouncements made about 'the great crime of crimes' at its inception.[8]

Since then, successive generations of commentators have interpreted the Nuremberg and Tokyo tribunals in their own ways, influenced by the conflicts and concerns of their own times. During the Cold War, it was generally assumed that these trials were an experiment that was not likely to be repeated, but since then, with the revival of interest in international criminal law, practitioners have paid greater attention to the post-war tribunals. Of the substantive charges heard there, crimes against peace has thus far attracted less attention than the others, but this situation has begun to change, spurred by the decision in June 2010 to amend the International Criminal Court's statute to include the 'crime of aggression' within its operative remit. In this context, the ideas and debates that shaped the earlier charge of 'crimes against peace' assume a new significance beyond their obvious historical importance: they offer valuable lessons to lawyers and legislators grappling with similar issues today.

[8] London Conference, p. 384.

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Singapore, December 2012

Abbreviations

AAD	Access to Archival Databases, NARA
AAOM	Wellington Supreme Court records, New Zealand
ADM	Admiralty, London
AMAE	Archives du Ministère des Affaires Étrangères, Paris
AWM	Australian War Memorial, Canberra
BWCE	British War Crimes Executive
CAB	Cabinet Office, London
CO	Colonial Office, London
DO	Dominions Office, London
EA	Department of External Affairs; Canberra, Ottawa or Wellington
FCO	Foreign and Commonwealth Office, London
FEC	Far Eastern Commission
FO	Foreign Office, London
FRUS	*Foreign Relations of the United States*
GU	Georgetown University
HLS	Harvard Law School
ICC	International Criminal Court
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
LCO	Lord Chancellor's Office, London
LoC	Library of Congress
NAA	National Archives of Australia
NANZ	National Archives of New Zealand
NARA	National Archives and Records Administration, United States
OSS	Office of Strategic Services, United States
PREM	Prime Minister's Office, London
TNA	The National Archives, United Kingdom

UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNWCC	United Nations War Crimes Commission
WO	War Office, London

Contents

1 The emergence of the concept of aggression

Just after the Germans signed the armistice ending the First World War on 11 November 1918, the British Prime Minister David Lloyd George visited Newcastle, electioneering on behalf of his incumbent Coalition Government. Addressing a packed audience at the Palace Theatre, he raised the theme that was to dominate that year's 'khaki election': the ex-Kaiser's responsibility for a criminal war. *The Times* republished his speech verbatim, complete with responses from the audience:

> Somebody ... has been responsible for this war that has taken the lives of millions of the best young men in Europe. Is no one to be made responsible for that? (Voices, 'Yes.') All I can say is that if that is the case there is one justice for the poor wretched criminal, and another for kings and emperors. (Cheers.) There are ... undoubted offences against the law of nations ... The outrage upon international law which is involved in invading the territory of an independent country without its consent. That is a crime ... Surely a man who did that ought to be held responsible for it. (Voices. 'Fetch him out,' and 'We will get him out,' and cheers.)[1]

Lloyd George's proposal, embodying the ideas that initiating a war was a crime and that individuals could be held responsible for it – the constituent elements of the latter-day 'crime of aggression' – was ahead of its time. It raised issues that prefigured future debates, such as whether national leaders could be held personally responsible for embarking upon war, and if so, whether their punishment should take a legal or a political form. But the idea soon stranded on the rocks of judicial disapproval: it was Lloyd George's own Solicitor-General, Sir Ernest Pollock, who disposed of the idea at the Paris Peace Conference a few months later.

[1] 'Prime Minister on German crimes', *The Times* (30 November 1918), 6.

Thereafter, policy-makers and jurists looked towards the newly formed League of Nations – established to provide pacific methods for resolving differences between states – for solutions to the problem of war. The League signalled the beginning of the shift towards the delegitimisation of certain categories of war, and in the 1920s and 1930s, treaties and proposed treaties emphasised the unlawfulness of wars other than those of self-defence or international sanction. Some unratified drafts and resolutions went so far as to declare that aggression was an 'international crime'. But the idea of holding individuals criminally liable for aggression did not reappear until after the Second World War, when, at the Nuremberg and Tokyo tribunals, the Allied powers charged the Axis leaders with 'crimes against peace'.

The 'rather delicate' task

As soon as Lloyd George mooted the trial of the former Kaiser, he encountered opposition from his Cabinet colleagues. At an Imperial War Cabinet meeting on 20 November 1918, the Australian Prime Minister William Hughes rejected the idea outright: 'You cannot indict a man for making war', he said, because 'he had a perfect right to plunge the world into war, and now we have conquered, we have a perfect right to kill him, not because he plunged the world into war, but because we have won.'[2] Munitions Minister Winston Churchill also rejected the idea, warning: '[Y]ou might easily set out hopefully on the path of hanging the ex-Kaiser ... but after a time you might find you were in a very great *impasse*, and the lawyers all over the world would begin to see that the indictment was one which was not capable of being sustained.'[3] But Lloyd George did not let the matter drop. On 2 December he met with Georges Clemenceau, Vittorio Orlando and their ministers in London, and, notwithstanding the Italians' reservations,[4] they jointly decided that the ex-Kaiser should be surrendered to an international court for authorship of the war and breaches of international law by the German forces.[5] A month later, Lloyd George and a large British delegation departed for France, where the victorious

[2] Imperial War Cabinet 37, 20 November 1918, 7, 8: CAB 23/43, TNA.
[3] Ibid., 8.
[4] V.E. Orlando, 'On the aborted decision to bring the German Emperor to trial', *Journal of International Criminal Justice* 5 (2007), 1023.
[5] FO to Washington and New York, 2 December 1918: FO 608/247, TNA.

powers were gathering for the preliminary sessions of the Paris Peace Conference.

At Paris, the major entente powers – Britain, France, the United States, Italy and Japan – faced the task of drafting terms with the defeated powers, establishing a post-war international order, and (to borrow a phrase from a later era) keeping the Germans down, the Americans in, and the Russians out. Regarding the 'German question', they proposed reparations, part-occupation, and the redistribution of colonies and peripheries. For the 'Russian problem', they sought to undermine the new government and defuse revolutionary movements in Germany, Hungary and elsewhere. As for the United States, they hoped that it would permanently abandon its neutrality and take up international responsibilities within the proposed League of Nations.

On 25 January 1919, the preliminary Peace Conference delegated to the 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties' the task of deciding whether the Germans and their allies had violated international law by initiating or fighting the First World War, and, if so, recommending suitable penalties. This fifteen-member body was presided over by the American Secretary of State, Robert Lansing, and included among its members the British Attorney-General Sir Gordon Hewart and Solicitor-General Sir Ernest Pollock, Greek Foreign Minister Nicolas Politis, New Zealand Prime Minister William Massey, and the jurists Edouard Rolin-Jacquemyns of Belgium and Ferdinand Larnaude of France.

The Commission's task was 'rather delicate', Georg Schwarzenberger later observed, because it had to establish legal responsibility for some acts committed at the beginning of the war, which were then lawful but had subsequently become 'highly reprehensible'.[6] Deep differences emerged between the American and European delegates. The Americans feared that a trial would establish legal precedents affecting sovereignty, and spark insurrection in Germany, and therefore wished to avoid the distortion of the law to deal with the ex-Kaiser and his ministers. But British and French delegates, who represented nations that had borne the brunt of the war in Western Europe, insisted upon the establishment of some kind of international tribunal to determine responsibility for crimes arising from the conflict.

[6] G. Schwarzenberger, 'War crimes and the problem of an international criminal court', *Czechoslovak Yearbook of International Law* (1942), 77.

Debates in the Commission and its subcommittees were frequently acrimonious. 'Feeling ran about as high as feeling can run', recalled the American delegate, James Brown Scott.[7] 'It ran especially high in the British membership, and it ran especially high in the French members. It ran so high that relations were somewhat suspended.'[8] This divergence of opinion resulted in a majority report, representing the views of the major European powers and their continental allies, and two reservations submitted by nations more insulated from the war's effects – the United States and Japan.

The alleged crimes of Germany

The Commission's majority report, produced on 29 March 1919, departed from positive international law on the question of 'laws of humanity', but not, as it turned out, on the initiation of the war. True, it stated at the outset that responsibility for the conflict lay 'wholly upon the Powers' – Germany and Austria, and their allies Turkey and Bulgaria – 'which declared war in pursuance of a policy of aggression, the concealment of which gives to the origin of this war the character of a dark conspiracy against the peace of Europe'.[9] And further, it insisted (against the prevailing act of state doctrine) that there was no reason why rank 'should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal', and that the point applied 'even to the case of Heads of States'.[10] But it stopped short of making the connection between the two ideas by holding the ex-Kaiser and his ministers criminally responsible for starting the First World War.

Again, the British played a decisive role. Lloyd George had earlier led the advance on the issue of responsibility for the war, and now other British ministers, who had in the meantime fully digested its implications, led the retreat. At the conference, Sir Ernest Pollock advised most strongly against charging the ex-Kaiser for initiating hostilities.

[7] J.B. Scott, 'The trial of the Kaiser', in E.M. House and C. Seymour (eds.), *What really happened at Paris: The story of the Peace Conference, 1918–1919* (London: Hodder & Stoughton, 1921), p. 480.

[8] Ibid.

[9] 'Commission on the responsibility of the authors of the war and on enforcement of penalties' (Paris Peace Conference), LON Misc. 43, 29 March 1919, 3.

[10] Ibid., 11.

He articulated the legal view that there was 'not a little difficulty in establishing penal responsibility upon the sovereign head of the State for conduct which was in its essence national, and a matter of state polic[y], rather than one of individual will'.[11] In his view, it was better to focus attention on traditional war crimes rather than on 'political crimes'.[12] And he warned of the dangers of bringing a case which would entail investigation of the causes of the war – a highly sensitive question involving many other nations aside from Germany – which 'must raise many difficulties and complex problems which might be more fitly investigated by historians and statesmen than by a Tribunal appropriate to the trial of offenders against the laws and customs of war'.[13]

Pollock was able, without much difficulty, to persuade his fellow members to support this line. As a result, the majority Commission report stated that despite conduct 'which the public conscience reproves and which history will condemn', they would not bring before the proposed tribunal acts which had provoked the war and accompanied its inception because 'by reason of the purely optional character of the Institutions at The Hague for the maintenance of peace ... a war of aggression may not be considered as an act directly contrary to positive law'.[14] It concluded: 'We therefore do not advise that the acts which provoked the war should be charged against their authors and made the subject of proceedings before a tribunal.'[15]

The majority did, however, believe that the ex-Kaiser and others were liable for the second cluster of crimes: 'Violations of the laws and customs of war and the laws of humanity'.[16] As with a charge of aggression, there was no precedent for bringing them before an international court. Trials for violations of the laws and customs of war, codified by the Geneva and Hague conventions, had hitherto only taken place in national courts, while indictments for the nebulous 'laws of humanity' had hitherto been unknown under international law. Nevertheless, the Commission proposed the constitution of an international 'High Tribunal' to try those that it held to be responsible for them.[17]

[11] 'Proceedings of a meeting of sub-committee No. 2 ...', 17 February 1919, 13–14: FO 608/246/1, TNA.
[12] Ibid., 4. [13] Ibid., 12.
[14] 'Commission', 12. [15] Ibid., 13.
[16] Ibid. [17] Ibid., 15.

American and Japanese reservations

The American reservation, written by Robert Lansing and James Brown Scott, advanced a comprehensive critique of the Commission's approach – and would become a benchmark for discussions about international justice in future decades. They agreed that those responsible for causing the war and violating the laws of war should be punished, but not by legal means. They argued that it was important to separate law and morality, and accept that only offences recognised in law were justiciable. Moral offences 'however iniquitous and infamous and however terrible in their results' were beyond the reach of judicial procedure.[18]

In particular, they objected to the idea of subjecting the ex-Kaiser to criminal proceedings for actions taken when he was head of state. They argued that national leaders were answerable only to their own people, not to foreign entities. In consequence, they stated that: 'heads of States are, as agents of the people, in whom the sovereignty of any State resides, responsible to the people for the illegal acts which they may have committed, and ... should not be made responsible to any other sovereignty'.[19]

In their view, the idea of trying the ex-Kaiser for actions not designated as crimes at the time they were carried out smacked of retroactivity. They noted that an act could not be a crime in the legal sense 'unless it were made so by law', and an act declared a crime by law 'could not be punished unless the law prescribed the penalty to be inflicted'.[20] The acts cited by the majority did not meet those criteria: there was no precedent for making a violation of the laws and customs of war – never mind the 'laws of humanity' – 'an international crime, affixing a punishment to it'.[21] They were therefore against the *ex post facto* creation of new law, new penalties and, in particular, a new tribunal, which were 'contrary to an express clause of the Constitution of the United States and in conflict with the law and practice of civilized communities', although they added that they *would* cooperate in the use of existing tribunals, laws and penalties.[22]

The Japanese reservation, submitted by the delegates Adachi Mineichirō and Tachi Sakutarō, raised a number of points that were highly pertinent to the future 1946–48 Tokyo Tribunal. Anticipating debates about 'victors' justice', the Japanese questioned whether it could

[18] Ibid., 51. [19] Ibid., 61. [20] Ibid., 60.
[21] Ibid. [22] Ibid., 61.